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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ROBERT O'NEAL,

Petitioner,

—v.—

FRED McANINCH, Warden,

Respondent.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF OHIO IN SUPPORT OF PETITIONER

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ISSUE PRESENTED

Once the petitioner in a federal habeas corpus action has carried the burden of establishing federal constitutional error at trial in state court, must the petitioner carry the additional burden of proving that the error was not harmless?

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union is a nationwide, nonpartisan organization with nearly 300,000 members dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The ACLU of Ohio is one of its affiliates.

The ACLU has long worked to protect the rights of criminal defendants and their access to the federal courts and has participated in numerous cases before this Court, as counsel for litigants or as *amicus curiae*, including *Brecht v. Abrahamson*, 507 U.S. __, 113 S.Ct. 1710 (1993), which redefined the harmless error standard in habeas corpus cases.

The party briefs elaborate on the particular circumstances of this case. This brief, by contrast, focuses on the doctrinal implications of requiring habeas petitioners, for the first time, to shoulder the burden of proof with respect to the alleged harmlessness of constitutional error.

STATEMENT OF THE CASE

In 1981, the petitioner, Robert O'Neal, was convicted of murder, robbery, and kidnapping in an Ohio state court. He was sentenced to a life term in prison and two terms of years. After exhausting state remedies, he sought federal habeas corpus relief on the ground, *inter alia*, that the instructions given to the jury at trial unconstitutionally relieved the prosecution of its burden to demonstrate his guilt beyond a reasonable doubt. *Sandstrom v. Montana*, 442 U.S. 510 (1979).

The district court concluded that Mr. O'Neal was en-

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

titled to relief, but a panel of the United States Court of Appeals for the Sixth Circuit reversed. *O'Neal v. Morris*, 3 F.2d 143 (6th Cir. 1993). In so doing, the circuit court held that the prisoner in a federal habeas corpus action bears the burden of defeating the respondent's argument that constitutionally invalid jury instructions were harmless. This Court granted *certiorari* to decide whether that allocation of the burden of proof was mistaken.

SUMMARY OF ARGUMENT

Prior to *Chapman v. California*, 386 U.S. 18 (1967), most courts understood that constitutional error in a criminal case could never be "harmless" and always warranted relief, either on direct review or in federal habeas corpus. That understanding changed after *Chapman*, where the Court held that some constitutional errors at trial could be ignored if it could be said with relative assurance that they had no effect on the ultimate verdict.

In rationalizing this fundamental change in constitutional jurisprudence, *Chapman* weighed the costs of automatic reversal against the risks of erroneous convictions and concluded that the system could tolerate some additional risk. To ensure that the idea of harmless error remained within close bounds, however, the Court held that no error could be considered harmless unless the prosecution demonstrated, beyond a reasonable doubt, that the error had not influenced the verdict.

The careful balance articulated in *Chapman* remained the governing rule for more than two decades until last Term's decision in *Brecht v. Abrahamson*, 113 S.Ct. 1710, which relaxed the *standard* for determining harmless error in habeas corpus cases pursuant to 28 U.S.C. §2254. Under *Brecht*, constitutional trial error can be held harmless if it had no "substantial" effect on the verdict within the meaning of the benchmark harmless error case, *Kotteakos v. United States*, 328 U.S. 750

(1946). This standard, of course, created a greater risk of erroneous conviction than the previously applicable *Chapman* rule.

Now, the risk of erroneous conviction has been increased still further by the decision of the Sixth Circuit in this case to shift the burden of proof with respect to harmless error to the prisoner. The circuit decision misapprehends the very nature of the decision the Court made in *Brecht* and, in so doing, scrambles the doctrine worked out by the combination of *Brecht*, *Chapman*, and *Kotteakos* in a way that threatens the bedrock objectives of the criminal justice system: accurate determinations of guilt or innocence.

Shifting the burden of proof with respect to harmless error is out of step with this Court's habeas decisions generally. Those decisions have justified various procedural barriers to the federal forum as efforts to conserve scarce federal judicial resources and to respect legitimate state interests. The burden allocation the circuit court has adopted does not streamline or expedite the processing of claims in habeas corpus, but impedes the federal courts' ability to adjudicate properly preserved claims on the merits.

In *Brecht*, this Court altered the standard by which federal habeas corpus courts judge harmless error, but did not disturb the traditional understanding that the burden of demonstrating that error was harmless lies with the party who stands to benefit from an affirmative determination: the respondent.

As justification for this decision, the circuit court erroneously relied on a single sentence in this Court's opinion in *Brecht*. On close examination, that sentence will not bear the weight the circuit attaches to it. Indeed, read as a whole, the *Brecht* opinion makes clear that the Court in that case did not alter the settled norm regarding burdens of proof.

The preservation of the burden on the respondent harmonizes the framework for harmless error analysis in habeas corpus cases under 28 U.S.C. §2254 with practice under the federal harmless error statute, 28 U.S.C. §2111; the relevant rule, Fed.R.Crim.P. 52(a); and, indeed, the very decision to which *Brecht* looked for primary guidance: *Kotteakos*. It also reconciles *Brecht* with this Court's cases on the effects of procedural default.

The conventional allocation of the burden of proof to the state is supported by solid, practical analysis. It advances the accuracy of criminal judgments, comports with ordinary expectations regarding the allocation of burdens in constitutional litigation, and assigns responsibility to the party with the incentive and capacity to develop the relevant evidence and arguments.

A reallocation of the burden of proof with respect to harmless error would complicate and confuse the determination of the merits of claims in habeas corpus, distorting the habeas courts' understanding and exposition of federal constitutional rights. Those distortions would not be offset by any practical benefits. Both the federal courts and state authorities would find their work more, not less, burdensome.

ARGUMENT

I. THE DECISION IN *BRECHT* DID NOT DISTURB THE SETTLED PRINCIPLE THAT THE RESPONDENT BEARS THE BURDEN OF PROVING HARMLESS CONSTITUTIONAL ERROR IN HABEAS CORPUS CASES PURSUANT TO 28 U.S.C. §2254

A. The Holding In *Brecht*

The *Chapman* framework for deciding whether error was harmless has two elements. First, *Chapman* establishes a *standard* of decision. Constitutional error can be

said to have been harmless only if the reviewing court concludes "beyond a reasonable doubt" that the error did not contribute to the verdict. 386 U.S. at 24, 26. Second, *Chapman* allocates the *burden* of proving that error was harmless under the "reasonable doubt" standard. Under *Chapman*, that burden clearly rests with the state. *Id.* at 24.

The question on which *certiorari* was granted in *Brecht* isolated the standard for judging harmless error from the allocation of the burden of proof under that standard.[2] At the outset of its opinion, the Court similarly defined the question before the Court as whether the *Chapman* "*standard*" applies in habeas corpus as well as on direct review. 113 S.Ct. at 1713-14 (emphasis added).[3]

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[2] The first question presented by the parties in *Brecht*, and the only question on which this Court granted *certiorari*, was:

> When considering violations of *Doyle v. Ohio* . . . in federal habeas corpus proceedings, is it consistent with constitutional due process and the Sixth Amendment right to trial by jury to abandon [a] *standard* of review of whether constitutional error was harmless beyond a reasonable doubt and substitute [a] *standard* of whether the error substantially affected the course of trial?

See Brecht v. Abrahamson, 112 S.Ct. 2938 (emphasis added).

[3] Specifically, the Chief Justice said:

> In [*Chapman*], we held that the *standard* for determining whether a conviction must be set aside because of federal constitutional error is whether the error 'was harmless beyond a reasonable doubt.' In this case we must decide whether the *Chapman* harmless error *standard* applies in determining whether the prosecution's use for impeachment purposes of petitioner's post-*Miranda* silence, in violation of due process under [*Doyle v. Ohio*], entitles petitioner to habeas corpus relief.

Id. (citations omitted)(emphasis added).

Having undertaken to decide only whether the *Chapman* "standard" applies in §2254 cases, the Court confined its judgment in *Brecht* accordingly. Referring to the *Chapman* standard, the Court held: "[I]t does not [apply]." 113 S.Ct. at 1714. Instead, after *Brecht*, the "less onerous" harmless error "standard" borrowed from *Kotteakos* controls. *Id.* Thus, the harmless error inquiry in §2254 cases is now whether conceded constitutional error at trial had a "substantial and injurious effect or influence" on the verdict. *Id.*, quoting *Kotteakos* at 776.[4]

There is no mistaking that both the Court's statement of the issue in *Brecht* and its statement of the judgment were narrowly couched to avoid lumping the two elements of *Chapman* together. When the Court mentioned the burden issue, it cleanly distinguished it and, moreover, expressly acknowledged that *Chapman* places the burden on the state. *Brecht*, 113 S.Ct. at 1717.

The Court wrestled at length in *Brecht* with the question whether the *Chapman* "reasonable doubt"

[4] The Court noted in *Brecht* that this means that the reviewing court must find "prejudice" of some order. *Brecht*, 113 S.Ct. at 1722, citing *United States v. Lane*, 474 U.S. 438, 449 (1986)(citing, in turn, Rule 52(a) -- which places the burden on the government). In this context, "prejudice" is very much a term of art. To say that "prejudice" is an issue is merely to signal that the error found to have occurred in a case is subject to harmless error analysis and that, accordingly, the reviewing court must explore the trial record to determine what its influence may have been. To say that "prejudice" is not an issue is to say that the error identified in a case is not susceptible to harmless error analysis -- because it is "structural" or otherwise linked to the core integrity of the process and thus mandates relief without an examination of the record. *See Brecht*, 113 S.Ct. 1717. It is possible, but potentially confusing, to say that errors in this second category are presumptively prejudicial. The point, however, is that no investigation or conclusion regarding their effect on the verdict is pertinent. On the usage of the term "prejudice," *see United States v. Olano*, 507 U.S. __, 113 S.Ct. 1770, 1778 (1993); James S. Liebman & Randy Hertz, "*Brecht v. Abrahamson*: Harmful Error in Habeas Corpus Law," 84 J.Crim.L. & Criminology 1401, 1413-14 n.47 (1994).

standard should be discarded in §2254 cases. By contrast, the Court offered no express treatment of the burden-of-proof question at all. Accordingly, *Brecht* must be understood to leave the burden of proof respecting harmless error where it has always rested: with the respondent. If the Court means in this case to revisit this long-settled principle of federal law, the starting place is not *Brecht*, but *Chapman* -- and all the other precedents endorsing *Chapman*.[5]

B. The *Dictum* In *Brecht*

The circuit court below mistakenly read a sentence in *Brecht* to assign the burden with respect to harmless error to the prisoner. Simply put, that sentence does not support the proposition for which the circuit cites it. In its entirety, it merely notes that petitioners are no longer entitled to habeas relief unless "they can establish" constitutional error that had a substantial effect on the verdict. *Brecht*, 113 S.Ct. at 1722. That, in turn, merely restates the Court's holding-in-chief: habeas corpus relief is not available unless the prisoner demonstrates constitutional error that survives harmless error analysis under the *Kotteakos* standard. There are several reasons for reading the sentence in this way and thus for declining to read it the way the circuit court has.

First, at the very most the sentence was *dictum*. When the Court turned to the harmless error question in *Brecht*, it simply examined the record and concluded that the error in that case had not had the necessary "substantial influence" on the verdict. The Court did not find the issue close and therefore had no reason to invoke the allocation of the burden of proof as a tie-

[5] *E.g.*, *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)(reversing a state court judgment because the state court had rebuffed the state's attempt to demonstrate that error had been harmless).

breaker. Indeed, the Court never referred to the burden question again. Nothing actually decided in *Brecht* depended on any allocation of the burden of proof.[6]

Second, the Court in *Brecht* did not squarely address the burden question, grapple with the issue, or *decide* it. The Court discussed its reasons for abandoning the *Chapman* standard for determining harmless error, but said nothing at all about an additional decision to shift the burden of proof. Since such a decision would have constituted a dramatic departure from precedent, as well as the very *Kotteakos* framework the Court incorporated in *Brecht*, it is dubious business to read an isolated line in its opinion to mean any such thing.[7] One "solitary sentence" embracing an unexamined proposition of law does not constitute an authoritative judgment. *Harper v. Virginia Dep't of Taxation*, 509 U.S. __, 113 S.Ct. 2510, 2510 (1993)(O'Connor, J., dissenting).

Third, the holding and the opinion in *Brecht* had majority support only inasmuch as Justice Stevens joined both. Justice Stevens, for his part, made it clear in his critical concurring opinion that he understood the Court

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[6] Indeed, the Court repeatedly articulated its precise holding entirely by reference to the shift in the standard from *Chapman* to *Kotteakos* and *never* by reference to any reallocation of the burden of proof. *E.g.*, *Brecht*, 113 S.Ct. at 1722:

> The *Kotteakos* standard, we believe, fills the bill. The test under *Kotteakos* is whether the error 'had substantial and injurious effect or influence in determining the jury's verdict' . . . . For the foregoing reasons . . . we hold that the *Kotteakos* harmless error standard applies . . . .

[7] Decisions that at best assume the applicability of legal rules, but do not "squarely address" them, are not entitled to *stare decisis* respect. *Brecht* itself is authority for this conventional understanding. *Brecht*, 113 S.Ct. at 1717-18 (discounting the precedential value of previous decisions invoking the *Chapman* "reasonable doubt" standard in habeas corpus).

to embrace the whole of the *Kotteakos* approach to harmless error -- both the "substantial" effect standard and the allocation of the burden to the prosecution. *Brecht*, 113 S.Ct. at 1723 (concurring opinion). In light of Justice Stevens' exacting language with respect to the burden issue and his participation in the Court's opinion as well as its judgment, it must follow that the sentence on which the circuit relies simply does not stand for the proposition the circuit ascribes to it.[8]

II. THE ALLOCATION OF THE BURDEN TO THE RESPONDENT IN §2254 CASES IS CONSISTENT WITH SIMILAR BURDEN ALLOCATIONS IN ALLIED CONTEXTS

When similar questions arise in adjacent fields of federal practice, this Court tries to achieve as much intellectual coherence as possible across doctrinal categories. Otherwise, different rules may develop for handling essentially the same problem in different contexts -- with no explanation for the inconsistency save that each body of law has developed in isolation. That kind of blindered jurisprudence produces only confusion, inefficiency, and injustice. The maintenance of the traditional burden allocation in this context reconciles harmless error doctrine in habeas corpus with other bodies of similar doctrine in related contexts and thus fosters clear, consistent analysis.

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[8] Justice White apparently read the Court to place the burden on the "defendant." *Brecht*, 113 S.Ct. at 1727 (dissenting opinion). Yet that characterization may, perhaps, be put down to a dissenter's inclination to cast the majority's work in the most negative light. Certainly the Court is not bound in this case to bow to a dissenter's account of a previous decision. *Cf. Forsyth County v. Nationalist Movement*, 505 U.S. __, 112 S. Ct. 2395, 2406 (1992)(Rehnquist, C.J., dissenting) (pointing out that "a mistaken allusion in a later case to the facts of an earlier case does not by itself undermine the holding of the earlier case").

A. 28 U.S.C. §2111

In *Brecht*, this Court did not cut harmless error in §2254 cases loose from *Chapman* and all other sources of guidance and set it free to develop its own independent body of new law. Quite the contrary, the Court explicitly embraced the standard for judging harmless error elaborated in *Kotteakos* and now codified in 28 U.S.C. §2111.[9] That choice was scarcely accidental. The Court explained that one of its chief reasons for introducing *Kotteakos* into habeas was to have the benefit of a ready-made body of existing case law to which the district courts can look for guidance. *Brecht*, 113 S.Ct. at 1722.

Clearly, then, *Brecht* was at pains to avoid inconsistency between cases arising under §2254 and those arising under §2111. Having incorporated the *Kotteakos* standard for judging harmless error on appeal, it is logical and reasonable for the Court also to embrace the burden allocation in that case. As Justice Stevens pointed out in *Brecht*, *Kotteakos* and its progeny place the burden of proving that constitutional error was harmless where it has traditionally rested -- with the prosecution. *Brecht*, 113 S.Ct. at 1723 (concurring opinion).

There is no question that Justice Stevens accurately portrays the longstanding and current rule that the government bears the burden in §2111 cases. *See Kotteakos*, 328 U.S. at 760-65 (explaining that the individual bears the burden only if he or she insists that a conviction

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[9] 28 U.S.C. §2111 is the so-called federal harmless error statute. It provides:

> On the hearing of any appeal or writ of *certiorari* in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

should be reversed on the basis of "technical" errors).[10] The decisive point is that in *Kotteakos*, and uniformly in cases decided under §2111, ties go to the individual. If after examining all the evidence and hearing all the contending arguments, the court remains in doubt regarding the effect an error had on the verdict, then the error cannot be found harmless and the conviction cannot stand.[11] This result, of course, follows as a logical imperative from the assignment of the burden of proof to the government.[12]

B. Federal Rule Of Criminal Procedure 52

The allocation of the burden to the respondent in §2254 cases and to the prosecution in appellate cases controlled by §2111 tracks, in turn, the same allocation under Rule 52(a) of the Federal Rules of Criminal Procedure.[13] Here again, in aid of consistency the statute

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[10] Of course, the reference to "technical" errors in the controlling statute, now codified at §2111, has since been deleted. That change makes no difference. *Brecht*, 113 S.Ct. at 1718 n.7 (explaining that the amendment in 1949 left the laboring language of the statute untouched). *See United States v. Rivera*, 900 F.2d 1462, 1469-70 (10th Cir. 1990).

[11] Specifically, the Court said in *Kotteakos* that if the court "cannot say, with assurance . . . that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected" and thus that the error was harmless. 328 U.S. at 765.

[12] *Cf.* Fleming James, Jr., Geoffrey C. Hazard, Jr. & John Leubsdorf, CIVIL PROCEDURE 338 (4th ed. 1992)(recalling Dean Wigmore's explanation of the "risk of nonpersuasion"). It is only fair and just that the prisoner whose constitutional rights have concededly been violated, and whose liberty (or whose very life) hangs in the balance, should have the benefit of the doubt when, after hearing the arguments on both sides of the harmless error question, a court finds itself in "mental equipoise."

[13] Rule 52 states:

> (a) Harmless Error. Any error, defect, irregularity or vari-

(continued...)

has been reconciled with the rule,[14] and the rule has been read to put the burden of proof on the government.

This settled understanding was reaffirmed last Term in *United States v. Olano*, 113 S.Ct. at 1778, decided only a week after *Brecht*.[15] Rule 52 has two parts: Rule 52(a) governs "harmless error," while Rule 52(b) controls "plain error." As the Court explained in *Olano*, the *standard* for deciding whether error is reversible is the same under both parts of the rule. Under either heading, criminal convictions must be overturned, unless the reviewing court concludes that the error identified did not affect the individual's substantial rights.

The difference between the two parts of the rule occurs, accordingly, with respect to the *burden* of demonstrating reversible error on that standard. Under Rule 52(a), the government bears the burden of demonstrating "harmless error;" under Rule 52(b), the individual bears the burden of showing "plain error." This difference is grounded, in turn, on the difference in the circumstances in which "harmless" or "plain" errors come to the reviewing court's attention. Rule 52(a) governs ordinary cases, in which the criminal defendant raised a timely objection below and contends that the error that occurred over that objection substantially affected the verdict. If the government hopes to avoid reversal notwithstanding such an error, then the government must prove to the court's satisfaction that the error had no such effect.

Rule 52(b), by contrast, governs extraordinary cases, in which the defendant failed to preserve an objection and then asks the reviewing court to consider the error anyway. In a case of that kind, the defendant's default in failing to enter a timely objection below typically results in a forfeiture of any opportunity to press the error on appeal. Rule 52(b) establishes a special safety valve, under which the reviewing court can overlook the defendant's default in order to correct "plain" errors. In that special situation, the government's ordinary burden is suspended, however, and the individual is called on to demonstrate that the error *did* influence the result at trial.

It is Rule 52(a), then, that corresponds to the harmless error doctrine in habeas corpus cases and in appellate cases reviewed under §2111, because it is Rule 52(a) that governs errors that *were* raised in a timely and proper manner and therefore must bring reversal unless the government carries its well-settled burden of demonstrating that the verdict was unaffected. Under Rule 52(a), as under §2111, when the reviewing court retains doubt regarding whether error *did* substantially affect the verdict, that doubt must be resolved against the government -- which therefore plainly bears the burden of proof on the point.

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[13] (...continued)
ance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

[14] *United States v. Lane*, 474 U.S. at 454-55 (Brennan, J., concurring in part and dissenting in part).

[15] In *Olano*, the Court cited *Kotteakos* as authority on the meaning of Rule 52.

C. Cases Under §2254 In Which Petitioners Committed Procedural Default In State Court

The allocation of the burden of proving harmless error to the respondent in habeas corpus is also consistent with this Court's recent decisions on the effect of procedural default in state court. In those cases, the prisoner clearly does bear the burden of establishing both "cause" for the default and "prejudice" from the error that occurred, in some instances *because* of the default. *Coleman v. Thompson*, 501 U.S. __, 111 S.Ct. 2546, 2561-66 (1991).[16] That settled doctrine, however, presupposes that the prisoner does *not* bear the burden of showing prejudice in ordinary cases (like this one) in which a timely and proper objection *was* entered in state court, and there is no suggestion that the prisoner's claim is procedurally barred.[17]

[16] Alternatively, the prisoner may escape forfeiture for default by showing that a district court's failure to consider an error would result in a "miscarriage of justice." *Id.* at 2564.

[17] In some instances, a measure of "prejudice" forms an element of the substantive claim the prisoner wishes to advance. *E.g., Strickland v. Washington*, 466 U.S. 668 (1984)(ineffective assistance of counsel). In those instances, the prisoner does bear the burden of demonstrating "prejudice" as part of his or her affirmative obligation to demonstrate a constitutional violation in the first place. The measure of that "prejudice" is a function of the constitutional right involved. When the Court has recognized "prejudice" elements within substantive claims, it has typically done so after noting the constitutional policies that such an element can serve in the particular context. In this general, harmless error context, however, no such claim-specific policies are promoted by assigning the burden of demonstrating "prejudice" to the prisoner -- as though to attach a "prejudice" requirement with respect to all constitutional claims wholesale. Rather, once a prisoner has successfully made out a meritorious claim (including the establishment of any prejudicial effect required in that connection), the prisoner is not obliged to carry any additional burden of showing "prejudice" within the meaning of the *Brecht/Kotteakos* standard for harmless error.

Simply put, a prisoner who failed to preserve a claim in state court is required to shoulder the special burden of proving prejudice in order to avoid forfeiture -- the typical penalty for procedural default. But a prisoner who properly followed state rules for raising a federal claim is not required to carry any such burden.[18] If the burden allocation with respect to harmless error were otherwise, the system would be unintelligible. A prisoner would be saddled with the burden of establishing some form of prejudice, whether or not he or she complied with state procedures for raising federal constitutional claims.[19]

[18] In this way, the interplay between ordinary habeas cases and habeas cases in which default occurred in state court is a reprise of the interplay between the two parts of Fed.R.Crim.P. 52. Of course, the measure of the "prejudice" that a prisoner who committed default must establish to gain access to the federal forum in habeas corpus has been held to be greater than the measure of "prejudice" that a criminal appellant must establish to win reversal for "plain" error. *United States v. Frady*, 456 U.S. 152 (1982). The issue before the Court today, however, is not the nature or extent of the "prejudice" that a federal habeas court must look for when the respondent contends that conceded constitutional error was harmless, but whether the respondent has the responsibility to show the court where any such "prejudice" lies. The only way to harmonize the harmless error doctrine this Court has now launched for habeas corpus in *Brecht* with the similar doctrines discussed in the text is to place the burden of proof on the party shown to have committed a constitutional violation.

[19] Needless to say, a doctrine of that kind would upset the incentive structure that cases like *Coleman* evidently seek to foster. For prisoners will hardly be moved to enter timely objections in order to avoid having to establish prejudice as a way around forfeiture for default -- if they know that they will have to demonstrate prejudice anyway in order to defeat the respondent's contention that error was harmless.

III. THE CONVENTIONAL ALLOCATION OF THE BURDEN HAS SOUND THEORETICAL AND PRACTICAL FOOTING

In allocating the burden of proving harmless error to the respondent, *Chapman*, *Kotteakos*, and *Brecht* give effect to a familiar proposition with self-evident intellectual power and practicality. The respondent bears the burden because the state benefited from constitutional error at trial and stands to benefit yet again if the case for harmless error is sustained. This allocation makes sense for three reasons.

First, allocating the burden to the respondent promotes a central purpose of the criminal justice system: achieving "accurate determinations of guilt or innocence." *Cf. Brecht*, 113 S.Ct. at 1729 (O'Connor, J., dissenting). By relaxing the standard for determining harmless error in *Brecht*, this Court has already placed more of the risk of an erroneous conviction on the prisoner in custody. By preserving the traditional assignment of the burden of showing harmless error to the respondent, however, the Court ensures that the different standard now in place will not increase that risk beyond tolerable limits.

Second, allocating the burden to the respondent conforms to ordinary litigation convention, by which the party who wishes to persuade a court to act must shoulder the responsibility of demonstrating a good reason for acting. By hypothesis in a harmless error case, the prisoner has already demonstrated that constitutional error occurred at trial, and the respondent seeks to persuade the court to deny relief anyway -- insisting that the error had no serious effect on the verdict. An argument of that kind is a species of defense (in the nature of confession and avoidance), which is forfeited if not raised and pressed at the proper time and in the proper manner.[20]

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[20] *Cf. Wilson v. O'Leary*, 895 F.2d 378, 384 (7th Cir. 1990)(opinion of (continued...)

When a federal court has just found constitutional error and is poised to award relief, it can hardly come as a surprise to state's attorneys attempting to avoid that result that they will be called upon to provide a justification.[21] It makes sense, then, that the respondent must both plead and prove harmless error.[22]

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[20] (...continued)
Easterbrook, J.)(refusing to consider a harmless error argument raised only in a reply brief).

[21] If, by contrast to this settled understanding, the respondent were permitted to save harmless error claims until after other arguments prove insufficient, the processing of habeas corpus cases would be corrupted. *Cf. Granberry v. Greer*, 481 U.S. 129, 132 (1987)(making a similar point as justification for the rule that exhaustion doctrine claims are generally forfeited if not raised in a timely manner).

[22] It is true that in a civil action for damages against an executive officer who relies on qualified official immunity, the plaintiff must plead not only that the defendant violated the plaintiff's rights but that he or she violated "clearly established" law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). If the plaintiff's allegations are insufficient, the defendant is entitled to dismissal prior to discovery and, even if the allegations are adequate, the defendant may obtain summary judgment if discovery fails to reveal a genuine dispute of fact. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). In that limited way, the plaintiff is obliged to plead circumstances that will defeat the defense of qualified immunity.

The resulting departure from conventional burden allocation doctrine has been justified in that context, however, as a corollary to the notion that official immunity may often insulate the defendant from trial altogether. To that end, the cases place an unusual burden on the plaintiff to demonstrate early on that it is essential to conduct a hearing in order to determine whether the defendant actually committed the acts as alleged.

In the harmless error context, by contrast, there is no similar reason to depart from the norm. By hypothesis, a criminal trial has already taken place, and the task at hand is to examine the record of that trial to determine whether a conceded constitutional error had a substantial effect on its outcome. *Lockhart v. Fretwell*, 506 U.S. __, 113 S.Ct. 838, 842-43 n.2 (1993)(noting that harmless error analysis does not (continued...)

Third, allocating the burden to the respondent recognizes that the state has the capacity and incentive to develop the evidence and relevant arguments in order that the court can decide the harmless error question on a complete record. Under the *Kotteakos* standard, just as under the previous standard from *Chapman*, federal district courts search the trial record "*de novo*." *Brecht*, 113 S.Ct. at 1724 (Stevens, J., concurring).[23] They "still must decide whether they have sufficient confidence that the verdict would have remained unchanged even if the error had not occurred." *Id.* at 1731 (O'Connor, J., dissenting). If the district courts are to perform the duties that *Brecht* imposes on them, they need the assistance of state's attorneys who are familiar with individual cases and can lay bare the matters on which sound judgment can safely rest.[24]

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[22] (...continued)
take place until after the court has reviewed the trial record and concluded that constitutional error occurred). At this juncture, there is no justification for requiring the party who has just pleaded and proved a constitutional violation also to allege and prove that that error was prejudicial.

Indeed, given that the harmless error analysis necessarily entails a close examination of the record of the trial in retrospect, *Yates v. Evatt*, 500 U.S. __, 111 S.Ct. 1884, 1894 (1991), it simply will not work to move a showing of the effect of an error from the back end of a case (where the state has traditionally had the burden of making such a *showing*), to the front end (where the prisoner has traditionally had the burden of *pleading* a constitutional violation).

[23] *See United States v. Hasting*, 461 U.S. 499, 516-19 (1983)(Stevens, J., concurring)(explaining the difficulties judges face when they attempt to assess lengthy trial records for harmless error without guidance from state's attorneys).

[24] In many cases, a careful analysis of the harmless error question may turn on whether evidence untainted by constitutional error was so overwhelming that it is extremely unlikely that the verdict would have been different if the error had not occurred. When that kind of intensive investigation is necessary, the state's attorney is clearly the best
(continued...)

IV. AN ALLOCATION OF THE BURDEN TO THE PRISONER WOULD SKEW CONSTITUTIONAL ANALYSIS AND NEEDLESSLY COMPLICATE LITIGATION

A. The Effect On Constitutional Analysis

The circuit court's approach below frankly evokes concern that that court may misinterpret *Brecht* as a mechanism for neglecting the federal courts' core responsibility under the Habeas Corpus Act to redress constitutional error -- the very kind of abdication of responsibility that this Court has twice deflected in recent Terms. *Wright v. West*, 505 U.S. __, 112 S.Ct. 2482 (1992)(declining to hold that the federal habeas courts must defer to previous state judgments applying federal law); *Withrow v. Williams*, 507 U.S. __, 113 S.Ct. 1745 (1993)(declining to exclude *Miranda* claims from the scope of habeas corpus).

This Court decided in *Brecht* that the *Kotteakos* standard for harmless error, if properly administered, is consistent with the established principle of independent adjudication in habeas corpus. By way of reassurance, Justice Stevens made three related points.

First, Justice Stevens made it crystal clear that the federal courts retain the duty to exercise independent judgment regarding the merits of federal claims. Lest anyone think that the different standard for harmless error is meant to resurrect the general rule of deference that failed to find support in *West*, Justice Stevens expressly stated that the *Brecht* decision is consistent with the longstanding responsibility of the federal courts independently to apply federal law to the facts of particular

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[24] (...continued)
cost-avoider and thus should rationally be assigned the responsibility to undertake the task and spread the results before the court.

cases. *Brecht*, 113 S.Ct. at 1724, citing Justice O'Connor's dissent in *West*.[25] *Cf. Lockhart v. Fretwell*, 113 S.Ct. at 842-43 n.2 (confirming that "[h]armless error analysis is triggered only *after* the reviewing court discovers that an error has been committed")(emphasis in original).

Second, Justice Stevens made it clear that the *Brecht* decision gave the federal habeas courts no authority to transmute forthright adjudication of the merits of claims into a "single-minded focus on how the error may (or may not) have affected the jury's verdict." *Brecht*, 113 S.Ct. at 1724. Instead, those courts must conduct a thorough examination of the entire trial record in search of "all the ways that error can infect the course of a trial." *Id*. *Accord id*. at 1731 (O'Connor, J., dissenting). *See also Yates v. Evatt*, 111 S.Ct. at 1894.

Third, Justice Stevens confirmed that the burden of showing harmless error would remain with the prosecution. Plainly, this last element of the equation is vital to the other two. Under the framework Justice Stevens describes, a federal habeas court will ask in the first instance whether a prisoner has met his or her conceded burden of establishing constitutional error. Once the petitioner has carried that burden, the court will turn to the analytically distinct question whether the respondent can demonstrate that the error was harmless.

Assigning the burden with respect to harmless error to the prisoner would risk upsetting this framework in two ways. Initially, it would invite the district court to isolate the two issues in question (the merits of a claim and the harmless error inquiry), but to reverse the order in which they are taken up. Rather than determining at

[25] Justice Stevens pointed out that the opinion filed for the Court by the Chief Justice conducted such an examination in *Brecht* itself -- just as the plurality opinion filed for the Court by Justice Thomas had conducted such an examination in *West*. *Brecht*, 113 S.Ct. at 1724.

the outset whether the prisoner can establish that error occurred, the court might focus on whether the prisoner can show prejudicial effect -- and then proceed to the merits of the claim only after deciding that, if the claim proves to be valid, it will warrant relief. That approach would allow the harmless error analysis to frustrate the federal court's primary responsibility to evaluate a prisoner's substantive legal grounds for obtaining the writ.

Alternatively, such a reallocation of the burden would invite the court to collapse the two issues together. That, in turn, would inject a concern for the possible consequences of error into the threshold question of whether the prisoner can establish a constitutional violation in the first instance -- thus corrupting the determination of federal constitutional rights. In the end, the federal court would not genuinely be identifying and articulating the baseline constitutional violation, but rather would be conducting a loose appraisal of the general regularity of the proceedings in state court. That, of course, would produce the very last thing the Court wants in constitutional cases -- imprecision in the exposition of federal rights.

No such problems would arise if the burden of showing harmless error remains with the respondent -- as *Brecht* plainly intends.[26]

[26] In many instances, the portions of the trial record bearing on the error itself, on the one hand, and the effects of the error, on the other, may be different. This will be true, for example, in cases in which the argument that error was harmless depends on a claim that other, untainted evidence was overwhelming. If the court were to place the burden of showing error and the burden of proving that it was harmful on the prisoner, the court might erroneously neglect portions of the record that relate only to the latter. If, however, the burden of proving harmless error remains with the prosecution, the allocation of burdens itself will serve to channel the court's analysis of the record in the appropriate direction.

B. The Effect On Habeas Litigation

There is no basis for thinking that the distortions that would be spawned by the circuit's reallocation of the burden of proof would be justified by any diminution in the federal courts' workload in habeas corpus or by any advancement in state interests. Instead, imposing the burden on the prisoner would only add to the labors of federal district judges and state's attorneys alike. The district courts need the help they can get from state's attorneys familiar with the trial record and able to develop the evidence and arguments regarding the effect of constitutional error. Prisoners *may* have court-appointed lawyers at this point, but it is unrealistic to think that counsel newly assigned by the federal court to conduct a harmless error proceeding can offer anything like the efficiency of state's attorneys who have followed the case from the outset.

CONCLUSION

For the reasons stated above, the Court should reverse the judgment of the circuit court and remand with instructions to reconsider the petitioner's habeas corpus petition and, in so doing, to allocate the burden of proving that any error was harmless to the respondent.

Respectfully submitted,

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